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Abandoning dishonesty—A brief German comment on the state of the law after Ivey

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Abstract

The debate about the two-pronged *Ghosh* test for dishonesty has troubled academics and practitioners alike for some time. Concerns were raised about the jury's ability to determine both the objective honesty standard and the defendant's personal compliance with it, which might result in non-meritorious personal views allowing her to escape a dishonesty verdict. In *Ivey*, followed by *Barton and Booth*, the subjective test was abandoned altogether. The change has brought no doctrinal improvement, but instead unacceptably broadened criminal liability. Leaving the determination of a nebulous moral concept such as dishonesty to the jury is misguided, as it means determining a normative rule in the first place, which is not the jury's role. Looking at the German law on theft and fraud as a comparator system, the paper argues that dishonesty should be abandoned and replaced by a lawfulness element to which the rules on mistake of civil law can then be applied.

Keywords

Ghosh, *Ivey*, theft act 1968, dishonesty, correspondence principle, German law of theft and fraud, lawfulness, mistake of civil law

Going in circles

The two-pronged test of dishonesty in *Ghosh*[1], which replaced the test in *Feely*[2], had for years caused discussions[3] about the question of the defendant's insight into the objective standards of dishonesty the

1. *R v Ghosh* [1982] QB 1053.
2. *R v Feely* [1973] QB 530.
3. See the literature cited in Emily Finch, 'The Elephant in the (Jury) Room: Exploring Mock Jurors' Understanding of Different Approaches to Dishonesty' [2021] Crim L R 513–31; Cerian Griffiths, 'The Honest Cheat: A Timely History of Cheating and Fraud Following Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 6 (2020)' 40 LS 252–68.

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jury had to measure her state of mind against. Concerns were raised about alleged 'Robin Hood' defences[4] and clueless foreigners freeloading on public transport.[5] It seemed increasingly unacceptable that individuals should be able to wiggle out of offending societal morals by arguing that they really did not know what those standards were. In an increasingly culturally diverse, post-modern society, different parts of society may very well subscribe to different standards or disdain the idea of binding moral standards altogether.[6] The suggestion from 1998 by the Law Commission that '[i]n a diverse society it is beneficial to use a flexible concept to decide whether or not an activity is criminal'[7] was even then at best questionable, in theory as in practice. Nor is flexibility in the determination of criminalisation criteria—rather than their mere application—on a case-by-case basis a concept that complies with the rule of law as it is commonly understood.

The problem of defendants evading justice by touting wildly diverting ideas of honesty may have been overstated in any event, because in practical terms, as with honest and reasonable belief in mistake cases in general, no jury ever had to believe every far-fetched submission by the defendant of an honest belief that seemed on the facts entirely implausible, and the prosecution had and has a wide discretion to weed out undeserving cases before they go to court. Furthermore, there appears to have been no empirical research done on the numerical relevance of the second prong of *Ghosh* producing aberrations in outcomes, and anecdotal evidence suggests a lack of statistical relevance.[8]

Nonetheless, the subjective prong in *Ghosh* finally met its doom when the UK Supreme Court in a civil case, *Ivey v Genting Casinos (UK) (trading as Crockfords Club)*[9], opined in an *obiter dictum* that uniformity of law would demand that the standard in civil and criminal law should be the same.[10] The Court of Appeal obliged in *Barton and Booth*.[11] Now the standard is purely objective: The jury must

4. Lord Lane CJ in *R v Ghosh* [1982] QB 1053 at 1064—Robin Hood's defence actually never would have been that he was acting honestly under the law as it stood or that he was mistaken about the law, but that he was acting under some form of higher moral necessity, broadly understood, in the sense of Acts 5:29. That kind of argument is rarely, if ever, accepted once a case moves to court, as can be seen at the historical example of the prosecution and conviction of conscientious objectors to national military service.
5. This example is curiously enough still being used post-*Ivey* in the Crown Court Compendium of December 2020, as amended, at No. 8-6.4. See online at <www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-I-December-2020-amended-01.02.21.pdf> accessed 12 June 2021.
6. The Crown Court Compendium of December 2020, as amended, at No. 8-6.17, 3 rd specimen direction, exhorts the judge to keep giving the pre-*Ivey Hayes* direction at least for the categories of professional ethos and market practices, but the language also uses 'groups in society', which has the potential to acquire a wider meaning: 'There are no different standards of honesty which apply to any particular profession or *group in society* whether as a result of market ethos or practice. If you are sure that the defendant's conduct was dishonest, by the standards of ordinary decent people, the prosecution does not have to prove that the defendant recognised that the conduct was dishonest by those standards' (emphasis added). See online at <www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-I-December-2020-amended-01.02.21.pdf> accessed 12 June 2021.
7. Law Commission of England and Wales, Consultation Paper No. 155, Legislating the Criminal Code: Fraud and Deception, at para 5.9.
8. The former Criminal Law Commissioner, Professor David Ormerod, confirmed this in an email to the author of 22 May 2021: 'I don't know of any empirical research on Ghosh when it was "in force". The Ghosh direction was very rarely given. At the Crim LR Conference in 2017 when we had 150 practitioners present I did a straw poll and only 1 had ever been in a case in which it was delivered'. Professor Alan Reed, Northumbria University, concurred in an email of 23 May 2021, as did Natalie Wortley in an email of 11 June 2021 (one instance each for *Ghosh* and *Ivey* over a span of 11 years of practice and 4 years as a judge)—emails on file with the author. The Crown Court Compendium of December 2020, as amended, further supports this evaluation at No. 8-6.6.: 'How frequently it will be necessary to give a direction in accordance with *Barton* is open to question. Before *Ivey*, it was rare to need to give a *Ghosh* direction. This was explained in *Jouman* at para 17 (addressing the law as set out in *Ghosh*) on the basis that: "It is trite law that the legal directions in any summing-up must be tailored to the facts of the instant case and the issues raised by it"'. Online at <www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-I-December-2020-amended-01.02.21.pdf> accessed 12 June 2021.
9. *Ivey v Genting Casinos (UK) (trading as Crockfords Club)* [2017] UKSC 67.
10. Critical of the uniformity argument Cerian Griffiths (n 3).
11. *Barton & Booth v The Queen* [2020] EWCA Crim 575.

first satisfy itself of the actual state of mind of the defendant—an evidential issue they would have to ascertain under any test and which can therefore not really be called a *subjective* element of *Ivey*[12]—and then ask itself whether her conduct was in line with what the decent law-abiding people of England and Wales would consider honest. Everyone agrees, of course, that the problem with the first prong of *Ghosh* is still there: Can you solve a problem like a normative standard by letting many different and non-communicating groups of lay persons loose on defining and applying it on a case-by-case basis?[13]

Because that is the crux of the matter, and the reason why the post-*Ghosh* period will not lead to enhanced justice as long as the law clings to an essentially moral concept like dishonesty and leaves its definition and application in the hands of lay people on an ad hoc basis. The jury are meant to be fact finders. They do not decide questions of law. They certainly do not make law. However, the element of dishonesty in theft and fraud is not a descriptive fact as found in the natural world, such as the defendant's hair colour or height, or her whereabouts at the time of the offence. It is a normative standard which is more akin to a question of law. All of this is not strictly speaking news, because the Law Commission in its 1998 Consultation Paper No. 155 on fraud and deception had already realised the problematic nature of a vague concept such as dishonesty and its definition by a multitude of decision-makers:

> We [. . .] take the provisional view that it is undesirable in principle that conduct should be rendered criminal solely because fact finders are willing to characterise it as 'dishonest'.[14]

However, as the development since has shown, nothing came of this insight until the advent of *Ivey*, the adoption of which in criminal law by *Barton and Booth*, it is submitted, meant the law took a wrong turn. By allowing different juries in different cases across the country to decide in secret deliberations what the objective normative standard is in each and every case, unfettered by judicial guidance or even by the sharing of summaries of jurors' views, the current approach allows them in essence to make, and decide questions of, law in a manner much worse than Selden's proverbial 'Chancellor's Foot' in the law of equity.[15]

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12. See in this context No. 8-6.2. of the Crown Court Compendium as of December 2020, as amended, on the new *Barton* directions: '*When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held*. [. . .] Once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. *There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest*' (emphasis added). Online at <www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-I-December-2020-amended-01.02.21.pdf> accessed 12 June 2021.
13. For completeness' sake the following should be pointed out: The purely objective *Ivey/Barton and Booth* normative standard has also de facto introduced simple partial negligence liability for theft because it is now irrelevant whether the defendant knew about or appreciated her violation of the objective honesty standard set by the jury of the day. It is not even clear whether the jury's finding should be based on a judgment that she *should* have known, hence making liability for the dishonesty element possibly even strict. What this leaves of the general rule of the need for correspondence between *actus reus* and *mens rea* is unclear. It seems that yet another area of law has fallen before the rising ubiquitous conservative trend of mistaking the accommodation of the vocal demands of paragons of public opinion or the various special interests around protecting the public and the victims of crime for sound legal policy.
14. (n 7) at paras 1.23, 5.9–5.32.
15. 'Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience'—J Selden, Table Talk; as quoted in Michael Evans/R. Ian Jack (eds), *Sources of English Legal and Constitutional History* (Butterworths, Sydney 1984) 223–24.

Yet, conclusions from recent research by Emily Finch would seem to indicate that there might even be a need or taste for doing away with giving *any* directions to the jury, because any instructions related to a specific test given to them would seem to confuse them:

> Perhaps then, if dishonesty is an ordinary word which is, as Lord Hughes suggested, more easily recognised than defined, then it should be left to the good sense of the jury to determine whether it is established using whatsoever approach they feel is appropriate. Of course, this creates concerns about consistency and certainty so perhaps a more appropriate conclusion would be to say that it seems that no direction is better than a direction that causes confusion as to its meaning and leads to a verdict that does not sit comfortably with the jury. In this respect then, despite recent developments, it seems that there is more work to be done.[16]

This conclusion may be understandable as a result of Finch's empirical jury deliberation research, yet, with all due respect, it is problematic if—despite her caveat about consistency—it is ultimately meant to be made the basis of how juries treat dishonesty in the future, in effect making the test a free-for-all without any advance guidance or attempts at standardisation that the certainty and foreseeability of the criminal law usually require. It is also in essence a return to the questionable finding in *Feely*:

> We do not agree that judges should define what "dishonestly" means. This word is in common use whereas the word "fraudulently" which was used in section 1(1) of the Larceny Act 1916 had acquired as a result of case law a special meaning. Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people. In their own lives they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty.[17]

This quote naturally always led to the question of why the term 'fraudulent' was allowed to develop into a technical term that the judges then became in charge of, when the Merriam-Webster online dictionary, for example, lists 'fraudulent' as a simple synonym for 'dishonest'.[18] An 'I know it when I see it' attitude does not sit easily with the requirement of ex-ante legal certainty, either, even leaving aside the specific question of Art 7 ECHR. Mirjan Damaška aptly and famously summarised the resulting fundamental policy concerns in 1986, resonating with Emily Finch's conclusion above:

> [L]aymen dislike being bound by technical criteria, not only because they do not always understand them, but also because such criteria may dictate results at odds with their ideas about the appropriate solution of the case—ideas likely to be generated by feelings about substantive justice. If external pressures nevertheless impose a degree of legalism on coordinate structures, the kinship of these structures with pragmatic legalism is far closer than their kinship with logical legalism. This is because the legalist of the pragmatic persuasion and the layman attached to substantive justice demand close attention to concrete particulars. To both, le bon Dieu est dans le détail. On the other hand, the regulation that appeals to logical legalists is alien to laymen. It displays insensitivity to the singularity of human drama, and its capacity to assure principled decision making leaves laymen unimpressed. They are likely to prefer warm confusion to cool consistency.[19]

16. Finch, (n 3) 513–31 at 531.
17. (n 2) at 537–38.
18. See <www.merriam-webster.com/thesaurus/dishonest> accessed 12 June 2021.
19. Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, New Haven 1986) 28.

Laird has rightly argued that the *Ivey* Supreme Court, which strangely enough seemed to accept the 'foreigners on the bus'[20] as an example of honesty, should have considered the more legally complex examples that jurors might face:

> Whilst the Supreme Court may be correct that the tourist who genuinely believes that public transport is free would not be considered dishonest, it would have been preferable for the Court to have engaged with the kind of scenarios in which a *Ghosh* direction was most likely to have been given, namely those involving complex financial transactions far removed from the average juror's experience.[21]

Once we realise that the element of dishonesty is a normative element which is in its nature hardly different from a rule of law, we can make the connection to the general principle that is much better suited to dealing with the defendant's mistake about it, that is, the concept of mistake of civil law, which has long been recognised in English law, especially in the context of the normative element of property 'belonging to another' under the offence of criminal damage in *Smith*.[22] In that manner, the correspondence principle would again continue to be honoured as it is by s 2 of the Theft Act 1968, whereas *Ivey* and *Barton* disregard it.

However, this does not in and of itself solve the conundrum of the moving target of different understandings by different lay people in different court cases of a nebulous concept like dishonesty. It has long been accepted that people may be as immoral, dishonest and scheming as they like in their motivations as long as they do not violate all the requirements of a specific law.[23] In the context of theft and fraud offences, that means more often than not complying with the civil law, but possibly also administrative law. If the conduct is lawful under civil or public law, then it should be so under criminal law. On that view, *Hinks*[24], for example, was indeed wrongly decided and serves as a reminder of the adage that 'hard cases make bad law'.[25]

Objective dishonesty after *Ivey* is different from any other civil law element like 'belonging to another' in that it is essentially now a blanket, open-ended and dynamic normative *actus reus* element with no more *mens rea* counterpart. It is meant to be defined and redefined by myriads of successive juries across the land who do not—and due to the secret of deliberations must not—even exchange their opinions on what was in a certain case considered dishonest or not, and why. It is a state of affairs that gives new meaning to the saying 'On the high seas and in court, we are in God's hands'. That cannot be right. Residual dishonesty as a merely moral separate criterion should have no distinct role to play in determining criminal liability if the defendant had, or honestly thought she had, a legal right or title to the

20. They would have to be blind as well, because they would see that *other* people pay, swipe a card and so on. It also presupposes a curious level of ignorance in foreigners, as if it was not a basic idea that when you go abroad you cannot expect things to be like they are at home. This example was thus always a red herring.
21. Karl Laird, Commentary on Dishonesty: *Ivey v Genting Casinos UK Ltd* (t/a Crockfords Club) 25 October 2017; [2017] UKSC 67, [2018] Crim L R 395–399 at 399.
22. *R v Smith (David)* [1974] QB 354; James LJ explained, at 360: 'Applying the ordinary principles of mens rea, the intention and recklessness and the absence of lawful excuse required to constitute the offence have reference to property belonging to another. It follows that in our judgment no offence is committed under this section if a person destroys or causes damage to property belonging to another if he does so in the honest though mistaken belief that the property is his own, and provided that the belief is honestly held it is irrelevant to consider whether or not it is a justifiable belief'. See also *Langford* (1842) Car & M 602; *Seray-Wurie v DPP* [2012] EWHC 208 (Admin).
23. Smith, Hogan and Ormerod's Criminal Law, 15th ed, 2018, 1076–1077: 'It makes no difference that D's conduct might be described as wanton (as where he destroys a work of art) or that his purpose is a crime of fraud (eg to defraud insurers). If D does not intend to destroy or damage property of another, nothing can render him liable to a charge under s 1(1). In *Appleyard*, discussed earlier, if D had believed that he owned the company's premises then he could not have been convicted of this offence whatever his motive (to defraud insurers or creditors, to inflict loss on the shareholders) may have been' (footnote omitted).
24. *R v Hinks* [2001] 2 AC 241 (HL).
25. First reported use in *Hodgens v Hodgens*, 4 CI Fin 323 (1837).

chattel, asset or other benefit. The task and power of defining objective dishonesty needs to be taken away from the jury in its entirety.

The aim of this short paper is thus to start a discussion about whether the English law on theft or fraud should not altogether consider discarding an ultimately undefinable moral concept such as dishonesty and move towards a principle with sharper contours such as a legal rule, even if it should mean losing flexibility and acknowledging that some people who would these days be liable would not be caught under the new rule. It seems as long as that concept survives, the problems related to it will, too. Locating it firmly in the legal sphere would also have the major benefit of giving the judge full control over the issue because—short of the exceptional instance of a jury nullification—the jury has to take the law from the judge.

In essence, the proposed approach would be relying on the ideas behind the explicit claim-of-right criteria for what is *not* dishonest under the exemptions listed in s 2 of the Theft Act 1968.[26] The Crown Court Compendium at No. 8-6.12. says the following on the s 2 exemptions:

> If the defendant's state of mind may have been within one of the situations provided for in s.2 he/she is not dishonest. In a case of theft *the jury must be reminded of the s.2 provisions* whenever they are raised by the evidence.[27]

If anything, this means that the second prong of *Ghosh* is still alive qua statutory provision as far as the s 2 exceptions to dishonesty are concerned, creating friction within the Theft Act 1968 for other states of mind of the defendant, and with the Fraud Act 2006 which has no such provision but was likely based on the assumption that *Ghosh* would apply anyway.[28]

We will take a brief look at the German law of theft and fraud as an example of a system that does not rely on ad hoc judgments by juries, with results possibly even depending on their composition and the ethnicity of the defendant[29], based on an elusive moral concept like dishonesty when it comes to aligning *actus reus* and *mens rea*. Instead, it refers to the simple question of whether the defendant had the intention of acquiring something she had no right to, in the knowledge that she had no such right. It is hoped that the debate in England and Wales may draw some inspiration from it.

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26. (1) A person's appropriation of property belonging to another is not to be regarded as dishonest—
    (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
    (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
    (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.
    (2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property
27. See <www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-I-December-2020-amended-01.02.21.pdf>—Emphasis added. accessed 12 June 2021.
28. See Matthew Dyson/Paul Jarvis, 'Poison Ivey or Herbal Tea Leaf?' (2018) 134 LQR 198–203 at 201: 'In addition, whereas the Theft Act 1968s.2 declares when an appropriation will not be dishonest (such as where a defendant believes that he has a claim of right over the property in question) the Fraud Act 2006 does not; that may be because Parliament did not feel the need to enact them in the new legislation because it intended the subjective limb of the *Ghosh* test to do the same work. Now that the subjective limb is gone, an unfortunate chasm opens up between theft on the one hand and fraud on the other. It would not be theft for person A to take person B's coat if person A believed they had a claim of right over it, but it could be fraud if person A misled person C into fetching the coat with that same state of mind. One response to this would be that it is better to have clear statutory definitions of honest or dishonest conduct for at least some situations: for theft that means letting s.2 do the work that the second *Ghosh* limb was probably doing, but that does not solve the problem for fraud and any offences without s.2 analogues'.
29. See, for example, Michael Bohlander, ''By a Jury of his Peers'—Multi-Racial Juries in a Poly-Ethnic Society' (1992) 14 Liverp Law Rev 67–81.

The German Law—Unlawfulness, Not Dishonesty[30]

We will look at the two basic provisions, ss 242 (theft) and 263 (fraud) of the German Criminal Code (*Strafgesetzbuch*—StGB), which are more restrictive as to what is penalised at all, than the English law. There is a provision on unlawful appropriation, s 246 StGB, which applies if the appropriation does not break someone's custody[31] but we will leave that aside here. Section 242 reads:

> (1) Whoever takes movable property belonging to another away from another *with the intention of unlawfully appropriating it for themselves or a third party* incurs a penalty of imprisonment for a term not exceeding five years or a fine.[32] [. . .]

Section 263 reads:

> (1) Whoever, *with the intention of obtaining an unlawful pecuniary benefit for themselves or a third party*, damages the assets of another by causing or maintaining an error under false pretences or distorting or suppressing true facts incurs a penalty of imprisonment for a term not exceeding five years or a fine.[33]

We are not concerned with other *actus reus* issues such as breaking custody or making false pretences, which also fall under the German equivalent of the correspondence principle in s 16 StGB, but only the intention to appropriate[34] or obtain *unlawfully*. The intention (*Absicht*), which is strong direct intent, must be aimed at a benefit, broadly speaking, the benefit must be (a) objectively unlawful for the defendant, and (b) the defendant must have at least conditional intent[35] (*dolus eventualis*) with regard to the question that it is unlawful, that is, she must at the very least realise that it may be unlawful and embrace that consequence in order to reach her ultimate goal. This is more than mere recklessness as understood in English law as it still requires a volitional element, but there is no need for full intention in that respect.[36] Absence of such knowledge is, according to the prevailing opinion in the case law and literature, a case of mistake of fact[37], not law, about a normative element of the *actus reus* in both theft and fraud[38], for which s 16(1) StGB of the Code's General Part provides:

> (1) Whoever, at the time of the commission of the offence, is unaware of a fact which is a statutory element of the offence is deemed[39] to lack intention. Any criminal liability for negligence remains unaffected.[40]

30. For a broader introduction to the law of property offences see Michael Bohlander, *Principles of German Criminal Law* (Hart, Oxford 2009) 213–28.
31. This provision may become relevant if the defendant took something, for example a coat, believing it to be her own and later realises that she made a mistake, because the intention to appropriate unlawfully must be present at the time of taking the object. She can then be liable for s 246 StGB if she keeps the coat—Johannes Wessels, Thomas Hillenkamp and Jan C Schuhr, *Strafrecht Besonderer Teil 2* (43rd edn C F Müller, 2020) 94; English law under s 3(1) Theft Act 1968 will treat this also as a case of theft, because it extended the remit of the offence compared to the previous offence of larceny under the Larceny Act 1916 and trespassory taking, for example, is no longer required.
32. Translation by the German Federal Ministry of Justice, online at <www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p2228>—Emphasis added. accessed 12 June 2021
33. Online at <www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p2372> –Emphasis added. accessed 12 June 2021
34. Appropriation does not have the same meaning as in English law, however. It means more than mere touching, but requires the defendant to act like an owner and to incorporate the stolen goods into his assets at least temporarily. This is in a sense the flipside of the intention to permanently deprive the owner of his property; see Thomas Fischer, *Strafgesetzbuch* (67th edn CH Beck, Munich, Germany 2020) § 242, marginal no (mn) 33–34.
35. Not to be confused with the idea of conditional intention as in s 9(1)(a) Theft Act 1968.
36. BGHSt 17, 90; BGH NJW 1990, 2832—Compared to the German law, English law recklessness straddles the fence between advertent negligence and *dolus eventualis*. On conditional intent under German law in general, see Bohlander (n 30) 63–67.
37. BGH NJW 1990, 2832.
38. See the further case law and literature references at Fischer (n 34) 49–51; § 263 mn 194–95.
39. This wording does not indicate a (rebuttable) presumption but is a stylistic choice. The literal translation is 'acts without intent'.
40. Online at <www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0138> accessed 12 June 2021.

There are no negligent theft and fraud offences in German law—unlike now possibly in England and Wales under *Ivey* and *Barton*[41]—hence the mistake results in an acquittal, unless the same conduct of the defendant violates other criminal laws, of course. Unlike for mistake of law under s 17 StGB, it is therefore also irrelevant for theft and fraud whether the mistake was avoidable—this might, obviously, otherwise lead to negligence liability for offences which have a negligence alternative. Questions about whether the belief was reasonable are only relevant for the evidential inference by the trial judge as to whether it was really, that is, honestly, held by the defendant but there is no *legal* standard of reasonable belief. If the defendant is mistaken and thinks that the appropriation is unlawful when in reality it is not, he may be liable for an impossible attempt.[42] The evaluation of the unlawfulness follows the civil law[43]; there is as a rule no separate criminal law standard against which the civil law relations are measured. All exceptions are based only on claim-of-right grounds or other legal justifications such as (presumed) consent and so on. Dishonesty as a general concept is unknown: A transaction that is legal under civil law cannot be turned into a crime because it may offend the decent ordinary citizens' moral views.

The case law has, for example, held that if someone takes the exact individual object she has bought – for example, a pair of custom-made shoes—and has a right to be delivered to her (so-called *Stückschuld*), there will be no unlawful appropriation[44]. However, if she only has a right to a certain number of individually unspecified objects of a certain category—for example, five plain white size-M T-shirts of a certain brand—(so-called *Gattungsschuld*), selecting and taking them herself may violate the seller's right of choice based on his ownership and hence is objectively unlawful. Yet, the courts will tend to consider this scenario to be a case of mistake under s 16(1) StGB because hardly any ordinary person will know that fine legal difference[45]. Equally, the courts will see the unauthorised taking of certain coins and bank notes as a *Gattungsschuld* but will allow for a mistake, whereas an increasing part of the literature already denies the existence of objective unlawfulness up to the amount the defendant is owed.[46] In some cases, general defences such as validly presumed consent of the owner might, for example, also provide a negation of the knowledge of the unlawfulness of the intended appropriation under application of s 16 StGB *mutatis mutandis*[47], similar to the principles established under *Williams (Gladstone)*[48] and more recently s 76 of the Criminal Justice and Immigration Act 2008.

Letting Go of Dishonesty

The point of these few examples is, of course, to show that the 'ordinary-citizens-know-what-dishonesty-means' paradigm underlying the post-*Ivey* view in English law, that is, to leave these issues to the jury, will continue to encounter the same old problems, unless the judge gives clear instructions to the jury on the standards to be applied. However, as was pointed out above, it would appear that English law post-*Ivey* would simply refer the claim-of-right exceptions under s 2 Theft Act 1968 to the jury without the judge necessarily always being required to give exact directions on the state of the law in order to decide whether the defendant would have fallen within the remit of one of the exceptions if she believed them to be so—on a *subjective* test that is no longer available to defendants facing dishonesty charges outside the ambit of s 2. The unfairness to defendants who do not hold a belief that qualifies under s 2 for consideration of their subjective views is thus palpable, to the point of wondering whether Art 14 HRA 1998 might not be triggered.

41. See fn (n 13).
42. Fischer (n 34) mn 49; § 263 mn 195.
43. Fischer (n 34) mn 49–50; § 263 mn 191.
44. BGHSt 17, 87 at 89.
45. BGHSt 17, 87; BGH NJW 1990, 2382—Further references for theft at Fischer, (n 34) mn 50.
46. Wessels, Hillenkamp, JC Schuhr, et al (n 31) 93.
47. Fischer (n 34) mn 50.
48. *R v Williams (Gladstone)* [1987] 3 All ER 411.

Ivey and its adoption into the criminal law by the Court of Appeal in *Barton* was an ill-founded move and has led to a broadening of criminal liability that violates the correspondence principle and equal treatment of defendants. The solution, however, is not to go back to *Ghosh* and its own unsolved problems with the first prong.[49] The way forward is to let go of the nebulous phenomenon of jury-defined dishonesty altogether and move to a clear, lawfulness-based regulation of the *mens rea* required for a defendant to evade the consequences of objectively unlawful actions. Section 1(1) Theft Act 1968 could simply be revised as follows:

> A person is guilty of theft if he *unlawfully* appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.

Section 2 Theft Act 1968 could be abolished on the understanding that the defendant must have the *mens rea* for the normative *actus reus* element 'unlawful' in the same way as expounded for 'property belonging to another' in *Smith*, and that the mistake of civil law doctrine, which underlies its present form, would cover the cases when the state of mind of the defendant was not in sync with the objective law. Most important for practical purposes, it would be a rule aimed at the standardisation of the parameters permitted to be considered by the jury, and which would require the judge to give a clear step-by-step instruction on the objective and subjective lawfulness criteria and for the jury to be bound by it. As long as one wishes to retain a jury system at all for cases involving legally complex issues, it is then acceptable to leave the evaluation of the defendant's factual submissions to the jury as in other cases. The jury should not be allowed again to set the standards of criminalisation themselves on a case-by-case basis, especially if they arrived at their conclusions in secret deliberations and without direct appellate accountability as would be the case if the trial was by judge only, because theft is triable either way.[50] Moreover, the case of *DPP v Gohill and Walsh*[51] shows that even judges occasionally disagree on what is dishonest and what is still within the bounds of propriety. Whether the proposal put forward in this paper is likely to bear fruit in a time when the law-and-order momentum is clearly in the direction of extending rather than restricting criminal liability, as well as in favour of the promotion of victim-centred policies is, of course, open to question.

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49. In this vein, however, Emily Ho Mei Li, 'Uprooting the Invasive Ivey: Reversing the Effect of Ivey v Genting Casinos Ltd on the Definition of Dishonest Appropriation in the English Law of Theft' (2019) 22 TCL Rev 189–98.
50. See for the details and examples of summary-only charges at <www.cps.gov.uk/legal-guidance/theft-act-offences> accessed 12 June 2021.
51. *DPP v Gohill and Walsh* [2007] EWHC 239 (Admin). The author would like to thank Natalie Wortley for referencing this case.